AND
BRIEFS

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In the Supreme Court of the United States

MICROSOFT CORPORATION,
Petitioner,

v.

SETH BAKER, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF DRI-THE VOICE OF THE DEFENSE BAR AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae DRI – The Voice of the Defense Bar, is an international organization of more than 22,000 attorneys involved in the defense of civil litigation. DRI is committed to enhancing the skills, effectiveness, and professionalism of defense attorneys. Because of this commitment, DRI seeks to promote the role of defense attorneys, to address issues germane to defense attorneys and their clients, and to improve the civil justice system. DRI has long participated in the ongoing effort to make the civil justice system fairer, more consistent, and more efficient. See http://www.dri.org/About. To promote these objectives, DRI participates as amicus curiae in cases that raise issues important to its membership, their clients, and the judicial system, including a number of cases raising important issues concerning class-action practice. *See, e.g.*, *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013); *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011). This is one of those cases.

When proposed classes fail to satisfy the generally applicable requirements of Federal Rule of Civil Procedure 23 for adjudicating the claims of many different persons at once, class certification is denied.

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[1] Pursuant to Supreme Court Rule 37.6, amicus curiae states that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from amicus curiae, its members, and its counsel, made any monetary contribution towards the preparation and submission of this brief. Pursuant to Supreme Court Rule 37.2(a), amicus curiae certifies that counsel of record for both petitioner and respondent have, after timely notification, consented to this filing in letters on file with the Clerk's office.

Plaintiffs can then petition "for *permission*" to appeal the adverse class certification decision under Rule 23(f), which grants the appellate courts discretion in determining whether to grant interlocutory appellate review of a district court order granting or denying certification. Advisory Committee Note (1998); *Dalton v. Lee Publications, Inc.*, 625 F.3d 1220, 1221 (Judge O'Scannlain, dissenting) (9th Cir. 2010). DRI has a strong interest in ensuring that the rules of civil procedure are consistently and fairly enforced in order to provide a fair and balanced civil justice system rather than circumvented - as demonstrated in this case – where a class plaintiff who was unsuccessful in seeking Rule 23(f) interlocutory review voluntary dismisses his case with prejudice in order to manufacture finality for purposes of forcing the appellate court to consider the class certification decision at the outset. This tactic is not available to defendants when class certification is granted, and thus results in a one-way avenue for an appeal. And equally problematic, it allows appeals from decisions that fail the test for interlocutory review under Rule 23(f) and 28 U.S.C. § 1292(b). Thus, the Ninth Circuit's decision directly affects the fair, efficient, and consistent functioning of our civil justice system. As such, it is of vital interest to the members of DRI.

DRI has a unique vantage point to help this Court understand the importance of proper adherence to the outer bounds of the appellate courts' jurisdiction over class certification decisions, not only from a legal standpoint, but also from practical and economic standpoints as well. DRI's members regularly must defend their clients against class suits in a wide variety of contexts. Accordingly, DRI, alone and in conjunction

with other legal organizations, has conducted seminars studying these lawsuits long before this case. DRI has also compiled a Class Action Compendium, which was designed to provide civil defense lawyers and corporate counsel with an understanding of the intricacies of class action practice and procedure. These and other seminars and writings on class action litigation also reveal DRI's longstanding interest in mass action litigation. DRI has also submitted testimony regarding the federal rules of civil procedure, potential legislation relating to class actions, and other issues arising from class action litigation.

Based on its members' extensive practical experience, DRI is uniquely suited to explain why this Court should take this case to settle the current disagreement between the circuits and announce a rule which adheres to the limits of appellate review of class certification decisions as set forth in Rule 23(f).

SUMMARY OF ARGUMENT

The Ninth Circuit's decision in this case casts aside fundamental rules and limits of appellate jurisdiction in order to allow class plaintiffs to force an immediate appeal of a class certification denial. Employing a flawed analysis, the Ninth Circuit ruled that class plaintiffs who were previously unsuccessful in obtaining interlocutory appellate review of class certification denial under Federal Rule of Civil Procedure 23(f) can obtain a second chance at an interlocutory appeal of the certification order simply by voluntarily dismissing their case with prejudice under Rule 41(a). *Baker v. Microsoft Corp.*, 797 F.3d 607 (9th Cir. 2015). That ruling, which runs afoul of 28 U.S.C. § 1292(b), Federal Rule of Civil Procedure 23(f), and this Court's decision in *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978), robs the appellate courts of their discretion to determine what class certification decisions warrant interlocutory appellate review and creates a one-way street for opportunistic plaintiffs looking to force defendants into high-dollar settlement through multiple appeals despite the existence of a meritorious defense.

This Court should grant review to make clear that class plaintiffs may not strong-arm an appellate court to hear a de facto interlocutory appeal from an order denying class certification by voluntarily dismissing their claims with prejudice. This rule maintains a fair and balanced system and is the favored approach of five circuits that addressed the issue. *See, Bowe v. first of Denver Mortg. Investors*, 613 F.2d 798 (10th Cir. 1980); *Camesi v. Univ. of Pittsburgh Med. Ctr.*, 729 F.3d 239 (3d Cir. 2013); *Rhodes v. E.I. DuPont de*

Nemours & Co., 636 F.3d 88, 100 (4th Cir. 2011), *cert. denied*, 132 S. Ct. 499 (2011); *Chavez v. Illinois State Police*, 251 F.3d 612 (7th Cir. 2001); *Druhan v. Am. Mut. Life*, 166 F.3d 1324 (11th Cir. 1999). However, the Ninth and Second Circuits have adopted the opposite view that such tactics are permissible. *Gary Plastic Packaging Corp. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 903 F.2d 176, 178-79 (2d Cir. 1990), *cert. denied*, 498 U.S. 1025 (1991). This Court can resolve the current circuit split by granting review and reversing the Ninth Circuit's decision, reaffirming the principles announced in *Coopers & Lybrand* and properly applied by the circuit majority.

Absent review from this Court, the defense bar will have no way to know the outer bounds of the courts' appellate jurisdiction and therefore will not be able to make informed strategic decisions in defending class suits. The current circuit split renders the status of the law unclear and fosters unpredictability. Further, absent review, class plaintiffs will likely migrate to the two circuits that have upheld this strategy, creating a forum-shopping scenario disfavored by the courts. This Court should grant review to reaffirm its prior pronouncement and clarify that voluntarily dismissing their claims with prejudice does not allow class plaintiffs to force an immediate appeal of a non-final certification order. This comports with Rule 23(f), which makes review of such certification orders purely discretionary. Creative tactics should not allow plaintiffs to eviscerate the discretion vested in the courts under the plain language of the rule. Review is therefore warranted.

ARGUMENT

The Court Should Grant Review To Resolve Conflicting Circuit Decisions And Clarify That Class Plaintiffs Cannot Force Appellate Courts To Hear A De Facto Interlocutory Appeal From An Order Denying Class Certification By Voluntarily Dismissing Their Claims With Prejudice

A. The Ninth Circuit's decision destroys the discretion given to the appellate courts in Federal Rule of Civil Procedure 23(f) by forcing the courts to review these non-final decisions– many of which have already been once considered and rejected

Federal appellate jurisdiction generally depends on the existence of a *final* decision "which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.'" *Catlin v. United States*, 324 U.S. 229, 233 (1945). The finality requirement serves an important purpose: preventing "the debilitating effect on judicial administration caused by piecemeal appeal disposition of what is, in practical consequence, but a single controversy." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 170 (1974). The courts of appeals are statutorily granted jurisdiction to consider appeals "from all final decisions" of the district courts. 28 U.S.C. § 1291. Because "the finality requirement embodied in § 1291 is jurisdictional in nature[, i]f the appellate court finds that the order from which a party seeks to appeal does not fall within the statute, its inquiry is over." *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 379 (1981). Limited statutory exceptions to the finality requirement, set

forth in 28 U.S.C. § 1292, are typically inapplicable to orders denying class certification, except in the rare case where the district court determines that the order involves a "controlling question of law as to which there is substantial ground for difference of opinion," in which case the courts of appeals have discretion to permit an interlocutory appeal. 28 U.S.C. § 1292(b). This is because "[a]n order refusing to certify, or decertifying, a class does not of its own force terminate the entire litigation because the plaintiff is free to proceed on his individual claim." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 467 (1978).

In *Coopers & Lybrand*, this Court held that "orders relating to class certification are not independently appealable under § 1291 prior to judgment" – even if the prejudgment order denying class certification would sound the "death knell" of the class action. *Id.* at 470. The "death knell" doctrine "assumes that without the incentive of a possible group recovery the individual plaintiff may find it economically imprudent to pursue his lawsuit to a final judgment and then seek appellate review of an adverse class determination." *Id.* at 469-70. Writing for a unanimous Court, Justice Stevens rejected the death knell doctrine as a means to manufacture finality, announcing that "the fact that an interlocutory order may induce a party to abandon his claim before final judgment is not a sufficient reason for considering it a 'final decision' within the meaning of § 1291." *Id.* at 477. In so doing, the Court recognized that the doctrine creates a one-way street for plaintiffs to obtain appellate jurisdiction of prejudgment orders denying class certification:

> First, the doctrine operates only in favor of plaintiffs even though the class issue—whether to certify, and if so, how large the class should be—will often be of critical importance to defendants as well. Certification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense. Yet the Courts of Appeals have correctly concluded that orders granting class certification are interlocutory. Whatever similarities or differences there are between plaintiffs and defendants in this context involve questions of policy for Congress.

Id. at 476. The Court was therefore mindful that any "choices" concerning whether to extend or reduce jurisdiction "falls in the legislative domain." *Baltimore Contractors v. Bodinger*, 348 U.S. 176, 181 (1955), overruled other gds, *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271 (1988).

After *Coopers & Lybrand*, Congress enacted 28 U.S.C. § 1292(e), which authorized the Supreme Court to "prescribe rules...to provide for an appeal of an interlocutory decision to the courts of appeals that is not otherwise provided for..." The Supreme Court's response in the class action context was to adopt Federal Rule of Civil Procedure 23(f), which authorizes a court of appeals to permit a timely "appeal from an order granting or denying class-action certification[.]" Fed. R. Civ. P. 23(f). *Id.* The Advisory Committee Notes to Rule 23(f) make clear that the drafters intended the courts of appeals to enjoy discretion to grant or deny permission to appeal "based on any consideration the

court of appeals finds persuasive." Fed. R. Civ. P. 23, Advisory Committee Notes to 1998 Amendments, Subdivision (f).

The Ninth Circuit's decision runs directly afoul of Rule 23(f) and the discretion given to the courts of appeals to grant interlocutory review of class certification orders. As the Ninth Circuit itself has observed, "the drafters [of Rule 23(f)] intended interlocutory appeal to be the exception rather than the rule." *Chamberlan v. Ford Motor Co.*, 402 F.3d 952, 959 (9th Cir. 2005). But the Ninth Circuit's decision directly contradicts its prior recognition that "petitions for Rule 23(f) review should be granted sparingly." *Id.* Perhaps best explained in *Coopers & Lybrand*, the Ninth Circuit's decision "thrusts appellate courts indiscriminately into the trial process and thus defeats one vital purpose of the final-judgment rule-'that of maintaining the appropriate relationship between the respective courts. . . [a] goal, in the absence of most compelling reasons to the contrary, is very much worth preserving.'" *Coopers & Lybrand*, *supra* at 476, quoting *Parkinson v. April Industries, Inc.*, 520 F.2d 650, 654 (2d Cir. 1975). The rule adopted by the Ninth Circuit completely erodes this balance by permitting non-final decisions to act as final decisions through strategic appeal tactics – tactics rejected by this Court. 437 U.S. at 476-77.

In short, the Ninth Circuit's ruling in this case distorts the carefully-calibrated balance of Rule 23(f) by eliminating all discretion granted to the courts of appeals to determine those select class certification decisions that warrant interlocutory review. It does so by allowing class plaintiffs to invoke the voluntary

dismissal rule, Fed. R. Civ. P. 41(a), to "manufacture" finality by stipulating to dismiss their claims with prejudice and forcing an appeal of the class certification decision. *Baker v. Microsoft Corp.*, 797 F.3d 607 (9th Cir. 2015). In the Ninth Circuit's view, class plaintiffs can invoke the court of appeals' jurisdiction under § 1291 "because a dismissal of an action with prejudice, even when such dismissal is the product of a stipulation, is a sufficiently adverse – and thus appealable – final decision." *Id.* at 612, quoting *Berger v. Home Depot USA, Inc.*, 741 F.3d 1061, 1065 (9th Cir. 2014). The Ninth Circuit's decision makes no attempt to limit the circumstances under which plaintiffs can force jurisdiction upon the appellate court, even though the plaintiffs in that case were previously unsuccessful in seeking interlocutory appellate review under Rule 23(f). *Baker*, *supra*, at 611.

B. The Ninth Circuit's decision is inconsistent with traditional understandings of the effect of a voluntary dismissal with prejudice

This Court should grant review to consider and reverse the Ninth Circuit's decision. Class plaintiffs must not be permitted to manufacture finality and force an immediate appeal of an order denying class certification simply by voluntarily dismissing their claims with prejudice. The very core of the Ninth Circuit's position "reflects a fundamental misunderstanding of the nature of a dismissal with prejudice." *Camesi v. Univ. of Pittsburgh Med. Ctr.*, 729 F.3d 239, 247 (3d Cir. 2013). Once a plaintiff voluntarily dismisses his or her claims with prejudice, those claims "are gone forever" – in other words, "not reviewable" by the appellate court and not permitted to

be "recaptured at the district court level." *Id.*, citing *Fairley v. Andrews*, 578 F.3d 518, 522 (7th Cir. 2009) and *Dannenberg v. Software Toolworks*, 16 F.3d 1073, 1077 (9th Cir. 1994). This comports with the rule that a party must be "aggrieved" by a district court judgment or order in order to have standing to appeal. *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 333 (1980). In its simplest terms, appellate review is reserved for a losing party seeking reversal of an adverse decision. It is not intended to be used by a plaintiff who has gripes with an interlocutory ruling but nonetheless agrees to dismiss his own case with prejudice. In that situation, the plaintiff is no longer an "aggrieved party" entitled to obtain appellate review.

Parties regularly dismiss counts of a complaint, theories of the case, or entire complaints on a voluntary basis. Federal Rule of Civil Procedure 41(a)(1) expressly allows for this. However, the traditional understanding is that once a plaintiff has done so, he cannot obtain subsequent appellate review of those abandoned theories. And even if a plaintiff does attempt to appeal, the appellate court will affirm on the grounds of waiver or abandonment of the issues via the voluntarily dismissal with prejudice. Allowing an appeal to proceed under this scenario – as the Ninth Circuit's decision does –will undermine the rule of law, causing grave confusion to litigants trying to resolve and termination litigation as to some theories or issues, and resulting in increased appellate litigation asking courts to overturn dismissals entered into by agreement.

This will turn the concept of voluntary dismissals on its head and require increased court intervention. Already, in some contexts– including if a class has been certified – court approval is required for a voluntary dismissal under Rule 41(a)(1). See, e.g., Fed. R. Civ. P. 23(e) (requiring court approval for voluntary dismissal of "[t]he claims, issues, or defenses of a certified class"); Fed. R. Civ. P. 66 (requiring a court order to dismiss any action in which a receiver has been appointed); 31 U.S.C. § 3730(b)(1) (plaintiffs cannot dismiss an action brought under the False Claims Act unless "the court and the Attorney General give written consent to the dismissal and their reasons for consenting."). The primary purpose of requiring a court order in such circumstances is "to prevent voluntary dismissals which unfairly affect the other side, and to permit the imposition of curative conditions." *Alamance Indus., Inc. v. Filene's*, 291 F.2d 142, 146 (1st Cir. 1961), citing 5 Moore, Federal Practice P41.05 (2d ed. 1951). Stated another way, while the voluntary dismissal mechanism serves several laudable goals – including saving the courts and parties time and money and aiding in the efficient operation of the civil justice system – it can undermine the legal system if used as a mere tool to obtain an appeal of a non-final issue that was decided prior to the agreement to voluntarily dismiss the case. This is precisely what the Ninth Circuit's decision accomplishes.

C. The appeal tactic permitted by the Ninth Circuit inures only to the benefit of class plaintiffs and distorts the balance of the civil justice system by placing unfair pressures on defendants

The need for this Court's review is underscored by the practical ramifications of the Ninth Circuit's decision on the businesses and individuals DRI's members regularly defend in class suits. The decision turns class action rules on their head and imposes economic and other improper strains on defendants. It does so in two major ways:

First, the Ninth Circuit's decision creates a one way-street which "operates only in favor of plaintiffs[.]" *Coopers & Lybrand*, *supra*, at 476. It is well-settled that only plaintiffs can opt to voluntarily dismiss their cases under Rule 41(a). Defendants have no such right; they can only be dismissed by the plaintiff or the court. However, the certification issue "will often be of critical importance to defendants as well." *Id.* In short, "[c]ertification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle the case and to abandon a meritorious defense." *Id.* Accordingly, the Ninth Circuit's decision gives class plaintiffs a procedural "leg up" in that it allows them to immediately appeal an order denying class certification, but disallows defendants from appealing an order certifying a class unless the court of appeals exercises its discretion under Rule 23(f) to consider the appeal on an interlocutory basis.

The fairer rule, and the one Amicus Curiae urges this Court to adopt, is that both plaintiffs *and*

defendants seeking review of a class certification decision before entry of a final judgment must proceed under Rule 23(f). If the court of appeals declines to exercise its discretionary jurisdiction under Rule 23(f), then there will be no appellate review of the certification decision – at least not until the district court issues a final decision. This puts class plaintiffs and defendants on a level playing field and restores the equity component built into Rule 23(f), which allows appeals "from an order granting *or* denying class-action certification under this rule..." Fed. R. Civ. P. 23(f) (emphasis added).

Second, the realized threat of not one, but two bites at the proverbial appellate apple (exemplified here, where the class plaintiffs first sought and were denied interlocutory appellate review under Rule 23(f) and then voluntarily dismissed their claims with prejudice and took an appeal) will force defendants into high-dollar settlements even if a meritorious defense exists. Even in the ordinary course, the grant or denial of a motion for class certification is a defining moment in the class action. Barry Sullivan & Amy Kobeleski Trueblood, *Rule 23(f): A Note on Law and Discretion in the Courts of Appeals*, 246 F.R.D. 277, 278 (2008) ("Arguably, the most critical stage in a class action is the point at which the court decides whether to certify the class."); Christopher A. Kitchen, *Interlocutory Appeal of Class Action Certification Decisions Under Federal Rule of Civil Procedure 23(f): A Proposal For A New Guideline*, Colum. Bus. L. Rev. 231, 232 (2004) ("A court's decision whether to certify a class is often the decisive moment in a class action...."); Kenneth S. Gould, 1 J. App. Prac. & Process 309, 312 (1999) ("The decision is often crucial....[it] can have a life or death

impact on the course of class action litigation...."); *Parko v. Shell Oil Co.*, 739 F.3d 1083, 1085 (7th Cir. 2014) ("the unwieldiness, the delay, and the danger that class treatment would expose the defendant or defendants to settlement-forcing risk are not costs worth incurring."). The certification decision becomes even more significant and protracted in light the Ninth Circuit's allowance of an immediate appeal from an order denying class treatment. In short, even if the district court denies class certification and the court of appeals denies the plaintiffs' request for review under Rule 23(f), the tactic permitted by the Ninth Circuit will require defendants to spend considerable resources to defend a full-fledged appeal of the class certification decision before even beginning to litigate the merits the claims.

This will place intense pressure on defendants to settle, even if an adverse judgment ultimately seems "improbable." See *Thorogood v. Sears, Roebuck and Co.*, 547 F.3d 742, 745 (7th Cir. 2008); *Matter of Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995). See also Barry F. McNiel, *et. al.*, *Mass Torts and Class Actions: Facing Increased Scrutiny*, 167 F.R.D. 483, 489-90 (updated 8/5/96). It is common knowledge that "the vast majority of certified class actions settle, most soon after certification." Robert G. Bone & David S. Evans, *Class Certification and the Substantive Merits*, 51 Duke L.J. 1251, 1291-92 (2002) ("[E]mpirical studies ... confirm what most class action lawyers know to be true."); see also Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 99 (2009) ("With vanishingly rare exception, class certification [leads to] settlement, not full-fledged testing of the plaintiffs' case by trial."); Thomas E.

Willging & Shannon R. *15 Wheatman, Attorney Choice of Forum in Class Action Litigation: *What Difference Does It Make?* 81 Notre Dame L. Rev. 591, 647 (2006) ("[A]lmost all certified class actions settle."). Even where the district court denies class certification and the court of appeals declines to review that decision under Rule 23(f), the threat of defending an additional appeal may tip the scales towards settlement. Failing to consider and reverse the Ninth Circuit's decision will only exacerbate these problems and proliferate more of these "blackmail settlements." *Rhone, supra* at 1298, citing Henry J. Friendly, *Federal Jurisdiction: A General View* 120 (1973). Simply put, "[s]uch leverage can essentially force corporate defendants to pay ransom..." S. Rep. No. 109-15, 17 20-21 (2005), reprinted in 2005 U.S.C.C.A.N. 3, 21; Michael B. Barnett, *The Plaintiffs' Bar Cannot Enforce the Laws: Individual Reliance Issues Prevent Consumer Protection Classes in the Eighth Circuit*, 75 Mo. L. Rev. 207, 208 (Winter 2010).

Careful adherence to the finality requirement and Rule 23(f) serves to guard against the ills set forth above. Appeals of class certification decisions brought after exhaustion of Rule 23(f)'s remedy under the backdrop of a voluntary dismissal harm the civil justice system, both because they create enormous litigation costs with no attendant benefit and because the appeals destabilize the carefully-calibrated equilibrium the rules were designed to create. They also foster inefficiency by allowing "piecemeal appeal disposition[,]" which in turn creates a "debilitating effect on judicial administration[.]" *Eisen,* 417 U.S. at 170. And, as discussed above, the strain this places on

the individuals and businesses that DRI's members are regularly called on to defend cannot be overstated.

D. This Court should take the case now, before further disagreement permeates the courts of appeals

The time is ripe for this Court to provide guidance to the bench and bar on whether plaintiffs may immediately appeal an order denying class certification by voluntarily dismissing their claims with prejudice. The current status of the law, plagued by inconsistency among the circuits to have addressed this issue, encourages forum shopping to the two circuits that permit this strategy. While this Court's general practice has been to allow issues to "percolate" to some degree in the courts of appeals before taking them up, this Court has never insisted that percolation run through every crevice of the judiciary before granting certiorari. *See, e.g., Filarsky v. Delia*, 132 S. Ct. 1657, 1661 (2012) (resolving 1-1 circuit conflict). The current five-to-two split constitutes sufficient percolation and evidences that this Court's guidance is not only proper, but necessary.

This issue is not going away. In 2014, the Ninth Circuit issued another published decision approving of this appeal strategy. *Berger v. Home Depot USA, Inc.*, 741 F.3d 1061 (9th Cir. 2014). The rapid spread of this appeal tactic is likely to continue, both in the Second and Ninth Circuits and elsewhere. Right now, the Central District of California is determining whether to allow a proposed class' attempt to voluntarily dismiss their concealment claims with prejudice "in a transparent bid for a second chance to appeal orders denying their motions for class certification." Joe

Van Acker, Consumers Pulling a Fast One in Cymbalta Case, Eli Lilly Says, *Law 360* (October 14, 2015) (citing *Saavedra et al. v. Eli Lilly & Co.*, Case No. 2:12:cv-09366 (United States District Court for the Central District of California).

Absent review by this Court, the federal courts will continue to apply 28 U.S.C. § 1291 and Federal Rules of Civil Procedure 41(a) and 23(f) inconsistently. This Court's review is therefore needed to resolve the circuit conflict and engender uniformity on the issue of whether class plaintiffs can use the voluntary dismissal rule to manufacture a final order. The current inconsistency among the appellate circuits leaves DRI's members unable to predict accurately for their clients the outcome of class certification requests. Certainly, the Ninth and Second Circuit's decisions will encourage potential class members to forum-shop, a practice looked upon with disfavor by the Court. See *Piper Aircraft Co v. Reyno*, 454 U.S. 235, 254 (1981); *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326 (1980). Beyond that, because of confusion among the federal circuits, DRI's members and clients have no way of knowing what standard the remaining circuits will apply. DRI therefore urges this Court to take this case and announce a clear rule that is capable of consistent application across the country.

CONCLUSION

For the reasons discussed in this brief and in the petition for a writ of certiorari, this Court should grant review and address the important issue raised by this appeal.

Respectfully submitted,

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